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QUALITY CONCRETE HOLDINGS BHD

v.

CLASSIC GYPSUM MANUFACTURING SDN BHD & ORS

B

COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
AZHAR MA'AH JCA
CLEMENT SKINNER JCA
[CIVIL APPEAL NO: Q-02-1075-2007]

C

14 SEPTEMBER 2011

CONTRACT: *Breach - Agreement - Failure to make payment - First defendant refused to pay and honour payment arrangement - Whether constituted a breach of contract - Whether agreement a legal, binding and*

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enforceable contract - Whether plaintiff entitled to be paid by first defendant - Whether plaintiff's claim allowed

CONTRACT: *Oral agreement - Existence of - Contemporaneous documents adduced to establish existence of oral agreement - Whether oral agreement contradicted with clauses found in written agreement - Whether*

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oral agreement fell within ambit of s. 92(b) Evidence Act 1950

CONTRACT: *Misrepresentation - Fraudulent misrepresentation - Whether there was fraudulent misrepresentation - Whether plaintiff defrauded by third defendant's false assurances*

F

CIVIL PROCEDURE: *Statement of claim - Amendment - Whether amendments crucial for proper and fair determination of dispute - Whether amendments ambiguous and prejudiced opposite parties - Whether Judicial Commissioner failed to appreciate plaintiff's claim*

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The first defendant and the plaintiff executed an Earthfilling Agreement whereby the first defendant ("employer") engaged the plaintiff ("main contractor") to complete site clearing, earth filing and levelling ("the said work") at a particular location. By way of

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an award letter, the plaintiff appointed the second defendant to carry out the actual work for the said project. According to the plaintiff, it was orally agreed between the plaintiff and the first defendant that the plaintiff engaged the second defendant as its sub-contractor and that payment to the plaintiff by the first

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defendant would be made back to back immediately upon the second defendant receiving its payment from the plaintiff. The said oral agreement was reached by the executive director of the

plaintiff (PW1) and the third defendant (DW2), the common director and shareholder of the first and second defendants. Based on the said oral agreement, the second defendant submitted its first progress claim of RM900,000 to the plaintiff and the plaintiff submitted their first payment claim of RM1 million to the first defendant. The plaintiff then paid the second defendant a partial payment of RM700,000 and the third defendant admitted to receiving it on behalf of the second defendant. However, in due course, when the plaintiff asked for its payment of RM1 million from the first defendant, the first defendant refused to pay and honour the 'back to back' payment arrangement. On the contrary, the first defendant represented by the third defendant denied that there was ever such an oral agreement. The plaintiff contended that the defendants had acted in concert through the representation of the third defendant to defraud the plaintiff. The plaintiff thus filed an action to recover the said sum from the defendants. After a full trial at the High Court, the Judicial Commissioner ("JC") dismissed the plaintiff's claim. The JC also dismissed the first defendant's counterclaim against the plaintiff. The issues raised in this appeal were whether the JC was right in law and in fact (i) when he held that the plaintiff's statement of claim was ambiguous and could not be entertained and in dismissing the plaintiff's claim against the first defendant notwithstanding the fact that there was evidence that the first defendant had failed to pay the plaintiff's first payment claim and thereby breaching the Earthfilling Agreement; (ii) in holding that the oral agreement infringed s. 92 of the Evidence Act 1950; (iii) in holding that there was no fraudulent misrepresentation by the defendants and/or the third defendant; and (iv) whether the second defendant ought to pay the preliquidated damages of RM50,000 per month for failing to complete the said work.

Held (unanimously allowing the plaintiff's appeal with costs; dismissing the first defendant's cross appeal with costs)
Per Abdul Malik Ishak JCA delivering judgment of the court:

(1) Prayer (1) of the statement of claim was amended on the request of the plaintiff. So long as the amendments are crucial for a proper and fair determination of the dispute between the parties and such amendments would not prejudice the opposite parties, such amendments would be

allowed. The JC had erred when he held that the amendment to prayer (1) was ambiguous and could not be entertained. The JC had failed to appreciate the basis of the plaintiff's claim. (paras 21, 23 & 24)

(1a) It was wrong for the JC to dismiss the whole claim of the plaintiff when there was ample evidence adduced that blatantly pointed to the breach committed by the first and second defendants under the two contracts – the Earthfilling Agreement and the award letter. The JC failed to give proper evidentiary value to the facts that the first defendant's refusal to pay and honour its obligations under the Earthfilling Agreement constituted a breach of the contract. The JC should have allowed the plaintiff's claim against the first defendant. The JC had also erred when he held that the plaintiff failed to prove the value of the work done. There was no dispute that the Earthfilling Agreement was a legal, binding and enforceable contract. (paras 35-39)

(2) There was no inconsistency between the oral agreement alluded to by PW1 with cl. 6 of the Earthfilling Agreement. Clause 6(b) of the Earthfilling Agreement merely states that the said sum is to be paid progressively within six months from the date of the said Earthfilling Agreement. It was silent as to 'when and how' the first defendant ought to make its progressive payment to the plaintiff and this gap was filled in by the oral agreement. Thus, the oral agreement fell squarely within the ambit of proviso (b) to s. 92 of the Evidence Act 1950. It did not contradict cl. 6(b). On the contrary, the oral agreement complemented the Earthfilling Agreement. Evidence was also adduced by the plaintiff that there existed an oral agreement between the plaintiff and the first defendant. Indeed there were three sets of contemporaneous documents to establish the truth of the existence of the oral agreement. (paras 55 & 57)

(3) The third defendant was the major shareholder of both the first and second defendants. The third defendant wielded power and exercised effective control over the operations of both the first and the second defendants. The third defendant was used as a conduit by the first and the second defendants to cheat the plaintiff. The third defendant had succeeded in using the first and second defendants to

defraud the plaintiff and in the process thereof the third defendant achieved unjust personal gains. Evidence showed that the third defendant was the person who requested payment from the plaintiff on behalf of the second defendant and it was the third defendant who collected RM700,000 from the plaintiff. According to PW1, the third defendant had given false assurances that the first defendant would pay. By virtue of the false representation by the third defendant, the plaintiff was defrauded. (paras 74-77)

(4) The JC ought to allow the plaintiff's claim against the second defendant for pre-liquidated damages of RM50,000 because there was evidence that the second defendant abandoned the said work after receiving RM700,000 from the plaintiff. The plaintiff had not committed any repudiatory breach. There was no evidence to show that the plaintiff had instructed the second defendant to stop work. (paras 78 & 79)

(5) The JC was correct in holding that the first defendant had failed to prove or show that the first defendant had suffered damages. The first defendant was the wrong-doer for refusing to pay the plaintiff the first progressive claim despite the evidence that showed 30% of the said work had been completed by the second defendant and that the plaintiff had even paid the second defendant. As the wrong doer and the party at fault, the first defendant could not now ask for a second bite of the proverbial cherry by claiming for the pre-liquidated damages of RM50,000. (paras 80 & 81)

(6) The plaintiff was legally entitled under the Earthfilling Agreement to be paid by the first defendant for work done for the sum of RM1 million. The failure on the part of the plaintiff to secure RM1 million had caused great injustice and hardship to the plaintiff bearing in mind that the plaintiff had paid a total sum of RM700,000 to the second defendant yet the plaintiff was unable to collect any payment from the first defendant. The JC failed to recognise that it was the first defendant who had breached the Earthfilling Agreement. It was a fundamental breach that went to the root of the contract. (paras 84 & 85)

Bahasa Malaysia *Translation Of Headnotes*

Defendan pertama dan plaintiff telah melaksanakan satu Perjanjian Earthfilling di mana defendan pertama ('majikan') telah melantik plaintiff ('kontraktor utama') untuk pembersihan tapak, pemfailan tanah dan proses meratakan ('kerja-kerja tersebut') di lokasi tertentu. Melalui Surat Award, plaintif telah melantik defendan kedua untuk menjalankan kerja-kerja bagi projek tersebut. Menurut plaintif, ia telah dipersetujui secara lisan di antara plaintif dan defendan pertama bahawa plaintif akan melantik defendan kedua sebagai sub-kontraktor dan bayaran 'back to back' kepada plaintif oleh defendan pertama akan dibuat sebaik sahaja defendan kedua menerima bayarannya daripada plaintif. Perjanjian lisan tersebut telah dicapai oleh pengarah eksekutif plaintif (PW1) dan defendan ketiga (DW2), pengarah dan pemegang saham defendan defendan pertama dan defendan kedua. Berdasarkan perjanjian lisan tersebut, defendan kedua mengemukakan tuntutan progres pertama RM900,000 kepada plaintif dan plaintif menyerahkan tuntutan bayaran pertama RM1 juta kepada defendan pertama. Plaintif kemudiannya membayar defendan kedua sebahagian bayaran iaitu RM700,000 dan defendan ketiga mengaku menerima bayaran itu bagi pihak defendan kedua. Walau bagaimanapun, apabila plaintif meminta bayaran RM 1 juta daripada defendan pertama, defendan pertama menolak untuk membayar dan menunaikan susunan bayaran 'back to back' perjanjian itu. Sebaliknya, defendan pertama yang diwakili oleh defendan ketiga menafikan bahawa terdapat perjanjian lisan tersebut. Plaintif berhujah bahawa defendan-defendan telah bertindak secara bersama melalui perwakilan defendan ketiga untuk menipu plaintif. Plaintif oleh itu telah memfailkan tindakan untuk mendapatkan jumlah tersebut daripada defendan-defendan. Selepas perbicaraan penuh di Mahkamah Tinggi, Pesuruhjaya Kehakiman ('PK') telah menolak tuntutan plaintif. PK juga telah menolak tuntutan balas defendan pertama terhadap plaintif. Isu-isu yang timbul di dalam rayuan ini adalah sama ada PK betul dari segi undang-undang dan fakta (i) apabila beliau memutuskan penyataan tuntutan plaintif adalah taksa dan tidak boleh dilayan dan dalam menolak tuntutan plaintif terhadap defendan pertama walaupun terdapat keterangan menunjukkan bahawa defendan pertama telah gagal membuat pembayaran pertama kepada plaintif dan dengan itu melanggar Perjanjian Earthfilling (ii) dalam memutuskan perjanjian lisan melanggar s. 92(b) Akta Keterangan 1950; (iii) dalam memutuskan bahawa tiada

misrepresentasi fraud oleh defendan-defendan dan/atau defendan ketiga; dan (iv) sama ada defendan kedua harus membayar gantirugi yang ditentukan RM50,000 sebulan kerana gagal menyiapkan kerja-kerja tersebut.

Diputuskan (sebulat suara membenarkan rayuan perayu dengan kos; menolak rayuan balas defendan pertama dengan kos)
Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

(1) Penyataan tuntutan plaintif telah dipinda atas permintaan plaintif. Selagi pindaan tersebut adalah penting bagi menentukan pertikaian di antara pihak-pihak terlibat dengan betul dan saksama dan pindaan-pindaan tersebut tidak akan memprejudiskan pihak-pihak bertentangan, pindaan-pindaan tersebut dibenarkan. PK telah khilaf apabila beliau memutuskan bahawa pindaan pada permohonan (1) adalah taksa dan tidak boleh dilayan. PK telah gagal melihat asas tuntutan plaintif.

(1a) Ia adalah salah untuk PK menolak tuntutan plaintif apabila terdapat beberapa keterangan yang menunjukkan satu pelanggaran telah dilakukan oleh defendan pertama dan kedua berhubungan dua kontrak – Perjanjian Earthfilling dan Surat Award. PK gagal memberikan nilai keterangan yang betul kepada fakta-fakta bahawa keengganan defendan pertama untuk membayar dan menunaikan obligasi-obligasi di bawah Perjanjian Earthfilling merupakan pelanggaran kontrak. PK seharusnya membenarkan tuntutan plaintif terhadap defendan pertama. PK juga telah melakukan kesalahan apabila memutuskan bahawa plaintif gagal membuktikan nilai kerja yang telah dibuat. Tiada pertikaian bahawa Perjanjian Earthfilling adalah sah, mengikat dan boleh dikuatkuasakan.

(2) Tiada ketidakselarasan di antara perjanjian lisan yang dimaksudkan PW1 dengan kl. 6 Perjanjian Earthfilling. Klausa 6(b) Perjanjian Earthfilling hanya menyatakan bahawa jumlah tersebut harus dibayar secara progresif dalam tempoh enam bulan dari tarikh Perjanjian Earthfilling tersebut. Ia tidak menyebut 'bila dan bagaimana' defendan pertama harus membuat bayaran progresif kepada plaintif dan jurang ini telah diisi dengan perjanjian lisan tersebut. Oleh itu, perjanjian lisan jatuh tepat dalam lingkungan proviso (b) kepada s. 92 Akta Keterangan 1950. Ia tidak bercanggah

dengan kl. 6(b). Sebaliknya, perjanjian lisan melengkapi Perjanjian Earthfilling. Keterangan juga dikemukakan oleh plaintif bahawa terdapatnya perjanjian lisan di antara plaintif dan defendan pertama. Terdapat tiga set dokumen-dokumen semasa untuk membuktikan kebenaran kewujudan perjanjian lisan.

(3) Defendan ketiga adalah pemegang saham utama defendan pertama dan kedua. Defendan ketiga mempunyai kuasa dan melaksanakan kawalan efektif atas operasi defendan pertama dan kedua. Defendan ketiga digunakan sebagai saluran oleh defendan pertama dan kedua untuk menipu plaintif. Defendan ketiga telah berjaya menggunakan defendan pertama dan kedua untuk menipu plaintif dan dalam proses itu defendan ketiga telah mencapai keuntungan diri yang tidak adil. Keterangan menunjukkan bahawa defendan ketiga adalah orang yang meminta bayaran daripada plaintif bagi pihak defendan kedua dan ia adalah defendan ketiga yang mengutip RM700,000 daripada plaintif. Menurut PW1, defendan ketiga telah memberi jaminan-jaminan palsu bahawa defendan pertama akan membuat bayaran. Dengan tanggapan palsu tersebut oleh defendan ketiga, plaintif telah ditipu.

(4) PK telah membenarkan tuntutan plaintif terhadap defendan kedua bagi gantirugi yang ditentukan iaitu RM50,000 kerana terdapat keterangan bahawa defendan kedua telah meninggalkan kerja-kerja tersebut selepas menerima RM700,000 dari plaintif. Plaintif tidak melakukan apa-apa pelanggaran repudiatory. Tiada keterangan yang menunjukkan bahawa plaintif telah mengarahkan defendan kedua untuk berhenti kerja-kerja tersebut.

(5) PK betul dalam memutuskan bahawa defendan pertama telah gagal membuktikan dan menunjukkan defendan pertama telah mengalami kerugian. Defendan pertama adalah orang yang bertindak salah kerana tidak membayar tuntutan progresif plaintif yang pertama walaupun keterangan menunjukkan 30% kerja-kerja tersebut telah diselesaikan oleh defendan kedua dan plaintif telah membayar kepada defendan kedua. Sebagai orang yang telah bertindak salah dan sebagai pihak yang bersalah, defendan pertama tidak boleh meminta untuk diberi peluang kedua menuntut gantirugi yang ditentukan iaitu RM50,000.

(6) Plaintif layak secara sah di bawah Perjanjian Earthfilling untuk dibayar oleh defendan pertama bagi kerja-kerja yang dibuat untuk jumlah RM1 juta. Kegagalan pihak plaintif untuk mendapatkan RM1 juta telah menyebabkan ketidakadilan dan kesusahan kepada plaintif kerana ia patut dipertimbangkan bahawa plaintif telah membayar jumlah sebanyak RM700,000 kepada defendan kedua tetapi plaintif tidak menerima apa-apa bayaran daripada defendan pertama. PK gagal untuk mengiktiraf bahawa defendan pertama telah melanggar Perjanjian Earthfilling. Ia adalah pelanggaran utama yang menjejaskan umbi kontrak.

Case(s) referred to:

Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd [1992] 2 CLJ 1185; [1992] 2 CLJ (Rep) 121 HC ***(refd)***

Asia Pacific Land Bhd & 5 Ors v. Datuk Bandar Kuala Lumpur [2005] 1 LNS 253 HC ***(refd)***

Automatic Self-Cleansing Filter Syndicate Company, Limited v. Cuninghame [1906] 2 Ch 34 ***(refd)***

Baldev Singh v. Mahima Singh & Ors [1974] 1 LNS 13 HC ***(refd)***

Ban Hong Joo Mines Ltd v. Chen & Yap Ltd [1968] 1 LNS 13 FC ***(refd)***

Clowes v. Higginson (1813) 1 Ves & B 524 ***(refd)***

Curtis v. Chemical Cleaning and Dyeing Co [1951] 1 KB 805 ***(refd)***

Davis v. Symonds (1787) 1 Cox Eq Cas 402 ***(refd)***

Dobell v. Stevens (1825) 3 B&C 623 ***(refd)***

Ferguson v. Wilson (1866) 2 Ch App 77 ***(refd)***

Foster v. Mackinnon (1869) LR 4 CP 704 ***(refd)***

Gold v. Patman and Fotheringham Ltd [1958] 2 All ER 497 ***(refd)***

Great Eastern Railway Company v. Turner [1872] 8 Ch App 149 ***(refd)***

Henry Williams And Others v. James Bayley (1866) LR 1 HL 200 ***(refd)***

Hong Fok Realty Pte Ltd v. Bima Investment Pte Ltd and Another Appeal [1993] 1 SLR 73 ***(refd)***

Hutton v. Watling And Another [1948] Ch 398 ***(refd)***

John Pym v. Robert James Roy Campbell, James Thompson Mackenzie And Richard Pastor Pritchard (1856) 6 EL & BL 370 ***(refd)***

John Shaw & Sons (Salford), Limited v. Peter Shaw And John Shaw [1935] 2 KB 113 ***(refd)***

Joscelyne v. Nissen and Another [1970] 2 QB 86 ***(refd)***

Lam Soon Oil and Soap Manufacturing Sdn Bhd & Anor v. Whang Tar Choung & Anor [2002] 2 SLR 395 ***(refd)***

Law Ngei Ung & Anor v. Tamansuri Sdn Bhd [1989] 2 CLJ 181; [1989] 2 CLJ (Rep) 44 HC ***(refd)***

Letchumanan v. Eng Mee Yong & Ors [1976] 1 LNS 59 HC ***(refd)***

Lim Kee Tiak v. Lim Kee Tian [1986] 1 LNS 15 HC ***(refd)***

Looi Guan Kway v. Low Lean Bok & 4 Ors [1937] 1 LNS 36 HC ***(refd)***

Madell v. Thomas & Co [1891] 1 QB 230 ***(refd)***

MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun [2002] 3 CLJ 577 FC ***(refd)***

Moore v. Garwood (1849) 4 Exch 681 ***(refd)***

Moschi v. Lep Air Services Ltd and another [1972] 2 All ER 393 ***(refd)***

Orion Insurance Co plc v. Sphere Drake Insurance plc [1992] 1 Lloyd's Rep 239 ***(refd)***

Pickering And Others v. Dowson And Others (1813) 4 Taunt 779 ***(refd)***

Reuss And Another v. Picksley And Another (1866) LR 1 Exch 342 ***(refd)***

Scriven Brothers & Co v. Hindley & Co [1913] 3 KB 564 ***(refd)***

Sierra Leone Telecommunications Co Ltd v. Barclays Bank plc [1998] 2 All ER 821 ***(refd)***

Spedding v. Fitzpatrick (1888) 38 Ch D 410 ***(refd)***

Stewart v. Eddowes And Another, Hudson And Others v. Stewart (1874) LR 9 CP 311 ***(refd)***

Stones v. Dowler (1860) 29 LJ Ex 122 ***(refd)***

Tan Ah Theam & Ors v. Ong Han Meng [2000] 4 CLJ 380 CA ***(refd)***

Tan Sri Dato Paduka (Dr) Ting Pek Khing v. Hii Chang Pee (No 2) [2003] 5 CLJ 554 HC ***(refd)***

Tan Yang Long & Anor v. Newacres Sdn Bhd [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666 HC ***(refd)***

Thorp v. Holdsworth (1876) 3 Ch D 637 ***(refd)***

Ultra Dimension Sdn Bhd v. Sepadan Tuah Sdn Bhd; Genesis The As Agency Sdn Bhd (Third Party) [2000] 6 CLJ 548 HC ***(refd)***

Williams v. Jones (1826) 5 B & C 108 ***(refd)***

Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 92

Rules of the High Court 1980, O. 18 r. 12(1)

Other source(s) referred to:

Dato' Seri Visu Sinnadurai, *Law of Contract*, 3rd edn, vol 1, pp 190, 191, 192

Sarkar, *Law of Evidence*, vol 1, p 1246

For the plaintiff/appellant - Jammie Tai; M/s Tang & Partners

For the 1st & 3rd defendants/respondents - Paul Tang Nguong Wee; M/s Tan, Yap & Tang Assocs

For the 2nd defendant/respondent - Jee Baldeweh Singh; M/s J B Singh & Co

[Appeal from High Court, Kuching; Suit No: 22-53-2000-II]

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Malik Ishak JCA:

Introduction

[1] The parties will be referred to like what they were referred to at the High Court. Thus, Quality Concrete Holdings Berhad will be referred to as the plaintiff while Classic Gypsum Manufacturing Sdn Bhd will be referred to as the first defendant. And Classic Ceiling Design And Construction Sdn Bhd will be referred to as the second defendant. Sim Chin Kui, an individual, will be referred to as the third defendant.

[2] After a full trial at the Kuching High Court, the learned Judicial Commissioner ("JC") dismissed the plaintiff's claim with costs to the defendants. The learned JC also dismissed the first defendant's counterclaim against the plaintiff with costs.

[3] On 12 November 2007, the plaintiff filed a notice of appeal to this court against the whole decision of the learned JC.

[4] On 22 December 2007, the first defendant filed a notice of cross-appeal to this court.

Facts of the Case

[5] On 15 October 1997, the first defendant and the plaintiff executed an Earthfilling Agreement whereby the first defendant ("employer") engaged the plaintiff ("main contractor") to complete site clearing, earth filling and levelling (referred to as "the said work") of Lots 565, 592 and 593 – all located at Block 4 Muara Tebas Land District for a contract sum of RM3.4 million ("the said work").

[6] By way of an Award Letter dated 18 October 1997, the plaintiff appointed the second defendant to carry out the actual work for the said project for a contract sum of RM3.2 million to be completed on or before 18 January 1998.

[7] According to the plaintiff, it was orally agreed between the plaintiff and the first defendant that the first defendant would engage the plaintiff to carry out the said work on condition that the plaintiff engaged the second defendant as its sub-contractor to

carry out the actual work and that payment to the plaintiff by the first defendant will be made back to back immediately upon the second defendant receiving its payment from the plaintiff. The said oral agreement was reached by Anne Kung (PW1) – the executive director of the plaintiff, and the third defendant (DW2) – the common director and shareholder of the first and second defendants.

[8] It was based on this oral agreement that the second defendant submitted its first progress claim of RM900,000 to the plaintiff on 18 November 1997 as reflected at p. 429 of the appeal record at vol. 11/part "C" and on 20 November 1997 the plaintiff submitted their first payment claim of RM1 million to the first defendant based on the value of the work done as at 15 November 1997 as seen at page 481 of the appeal record at volume 11/part "C".

[9] On 27 November 1997, the plaintiff paid the second defendant a partial payment of RM700,000 as shown at p. 482 of the appeal record at vol. 11/part "C" and the third defendant admitted receiving it on behalf of the second defendant.

[10] But, in due course when the plaintiff asked for its payment of RM1 million from the first defendant, the first defendant refused to pay and honour "the back to back" payment arrangement. On the contrary, the first defendant represented by the third defendant denied that there was ever such an oral agreement and refused to pay the plaintiff the sum of RM1 million.

[11] The plaintiff contended that the defendants have acted in concert through the representation of the third defendant to defraud the plaintiff. The plaintiff then instructed its solicitors Messrs Tang & Partners to file the present action to recover the said sum from the defendants.

The Agreed Facts

[12] Within a short compass, the facts that are not in dispute are as follows:

(a) The Earthfilling Agreement executed between the first defendant and the plaintiff on 15 October 1997 as seen at pp. 389 to 393 of the appeal record at vol. 11/part "C".

(b) The award letter issued by the plaintiff to the second defendant appointing the second defendant as the plaintiff's sub-contractor to carry out the actual work as reflected at pp. 394 to 395 of the appeal record at vol. 11/part "C". A

(c) The completion date for the said work was fixed on 18 January 1998. B

(d) On 18 November 1997, the second defendant submitted its first interim payment to the plaintiff for RM900,000 as reflected at p. 396 of the appeal record at vol. 11/part "C". C

(e) On 20 November 1997, the plaintiff submitted its progress claim no: 1 to the first defendant for RM1 million being the value of the work done as at 15 November 1997 as reflected at p. 481 of the appeal record at vol. 11/part "C". D

(f) On 27 November 1997, the plaintiff paid the second defendant RM700,000 *via* MBB cheque number 927342 as seen at p. 398 of the appeal record at vol. 11/part "C".

(g) The second defendant did not complete the said work on 18 January 1998. E

The Disputed Facts

[13] The disputed facts are as follows:

(a) There was an oral agreement reached between Anne Kung (PW1) and the third defendant (DW2) that the first defendant would engage the plaintiff to carry out the said work on condition that the plaintiff engaged the second defendant as its sub-contractor to carry out the actual work and that payment to the plaintiff by the first defendant will be made back to back immediately upon the second defendant receiving its payment from the plaintiff. F G

(b) That there was fraudulent misrepresentation between the defendants (particularly through the representation of the third defendant) to defraud the plaintiff when the second defendant claimed from the plaintiff RM900,000 knowing fully well that the first defendant would not pay the plaintiff immediately or at all. H I

(c) The third defendant who is the common director and shareholder of the first and second defendants had fraudulently misrepresented to the plaintiff that the first defendant would pay the plaintiff the sum of RM1 million by giving false assurances to Anne Kung (PW1) that the first defendant will pay the plaintiff.

Analysis

[14] On perusal of the plaintiff's Memorandum of Appeal, we compartmentalised them into five simple questions.

[15] Firstly, whether the learned JC was right in law and in fact when he held that prayer (1) of the plaintiff's statement of claim was ambiguous and cannot be entertained and, consequently, he dismissed the plaintiff's claim entirely?

[16] Secondly, whether the learned JC was right in law and in fact to dismiss the plaintiff's claim against the first defendant notwithstanding the fact that there was evidence that the first defendant had failed to pay the plaintiff's first payment claim of RM1 million and thereby breaching the Earthfilling Agreement?

[17] Thirdly, whether the learned JC was right in law and in fact in holding that the oral agreement infringed s. 92 of the Evidence Act 1950?

[18] Fourthly, whether the learned JC was right in law and in fact in holding that there was no fraudulent misrepresentation by the defendants and/or the third defendant?

[19] Fifthly, whether the second defendant ought to pay the pre-liquidated damages of RM50,000 per month from 18 January 1998 onwards for failing to complete the said work?

The First and the Second Questions

[20] We take the first and the second questions together. Prayer (1) of the statement of claim was amended on the request of the plaintiff's counsel with no objections by the defendants. The amendment was worded in this fashion:

> Against the defendants each of them the sum of RM1,000,000.00; or alternatively, damages.

[21] The court may at any stage of the proceedings allow the plaintiff to amend its pleading on such terms as to costs or otherwise as may be just and in such manner as the court may direct. It must be borne in mind that where the proposed amendment does not change the character of the dispute and made on a *bona fide* basis without causing any prejudice to the opposite party which could be compensated with costs, the court would readily allow the amendment (*MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577; and *Ultra Dimension Sdn Bhd v. Sepadan Tuah Sdn Bhd; Genesis The As Agency Sdn Bhd (Third Party)* [2000] 6 CLJ 548).

[22] The primary reason to allow an application to amend the pleadings is the need to ensure a fair trial of the action (*Lam Soon Oil and Soap Manufacturing Sdn Bhd & Anor v. Whang Tar Choung & Anor* [2002] 2 SLR 395). But the amendment will not be allowed if the resulting prejudice cannot be compensated in costs (*Tan Sri Dato Paduka (Dr) Ting Pek Khing v. Hii Chang Pee (No 2)* [2003] 5 CLJ 554).

[23] So long as the amendments are crucial for a proper and fair determination of the disputes between the parties and such amendments would not prejudice the opposite parties, such amendments would be allowed (*Looi Guan Kway v. Low Lean Bok & 4 Ors* [1937] 1 LNS 36; *Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428; and *Asia Pacific Land Bhd & 5 Ors v. Datuk Bandar Kuala Lumpur* [2005] 1 LNS 253).

[24] We have perused through the evidence and we must categorically say that the learned JC erred when he held that the amendment to prayer (1) was ambiguous and cannot be entertained. With respect, we say that the learned JC failed to appreciate the basis of the plaintiff's claim.

[25] The defendants have acted in concert through the representation of the third defendant (DW2) – the common director and shareholder of the first and second defendants, to defraud the plaintiff when they knew fully well that the first defendant has no intention to pay the plaintiff immediately or at all. That being the position, the defendants or anyone or more must be made to pay the plaintiff the sum of RM1 million.

[26] It is the duty of the learned JC to make a finding whether there was a breach on the part of the defendants or anyone or more, and only then would the consideration of making an award be made accordingly. With respect, the learned JC erred when he said that it was not for the court to "pick and choose" in what amount the defendants were liable in relation to a specific pleading. We categorically say that it all depends on the finding of facts.

[27] The third defendant (DW2) is a powerful individual. As a common director of the first and second defendants, the third defendant (DW2) acquires various legal capacities. He wears many hats. He is considered to be an agent of the first and second defendants. His relationship with the first and second defendants is that of a fiduciary. At times he is also considered to be a trustee.

[28] The Court of Appeal in *Automatic Self-Cleansing Filter Syndicate Company, Limited v. Cuninghame* [1906] 2 Ch 34 made it clear that the division of powers between the Board of Directors and the company in general meeting depended in the case of registered companies entirely on the construction of the articles of association and that where powers had been vested in the board the general meeting could not interfere with their exercise. The relevant article in that case provided that the management of the company should be vested in the directors who might exercise all the powers of the company which were not by the statutes or the articles expressly required to be exercised by the company in general meeting.

[29] The company in *Baldev Singh v. Mahima Singh & Ors* [1974] 1 LNS 13 were transport operators and they had resolved in their annual general meeting to incorporate Malay participation in the company and to have such Malay participation up to 30% of the issued and paid up capital of the company from shareholders approved by the Negri Sembilan Transport Operators' Association. The directors of the company subsequently decided to issue shares to Malay employees of the company though they were not approved by the Negri Sembilan Transport Operators' Association. Hashim Yeop A Sani J (later Chief Judge of Malaya) interpreted art. 46 of the articles of association and held that once the members in general meeting of the company resolve on the manner

of allotment it will not be open to the Directors to act contrary to the resolution subsequently. His Lordship further held that to construe art. 46 otherwise would be tantamount to encouraging conflicting control of activities of the two primary organs of the company.

[30] Again, on the powers of directors, Greer LJ in *John Shaw & Sons (Salford), Limited v. Peter Shaw And John Shaw* [1935] 2 KB 113 had this to say (see p. 134):

> A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders.

[31] Wayback in 1866, Sir H M Cairns LJ in *Ferguson v. Wilson* (1866) 2 Ch App 77 aptly said (see p. 89):

> What is the position of directors of a public company? They are merely agents of a company. The company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent.

[32] In *Great Eastern Railway Company v. Turner* [1872] 8 Ch App 149, Lord Selborne LC had this to say (see p. 152):

> The directors are the mere trustees or agents of the company - trustees of the company's money and property - agents in the transactions which they enter into on behalf of the company.

[33] We just cannot sweep under the carpet, so to speak, the contentions of the plaintiff that the third defendant (DW2) as a common director and shareholder of the first and second defendants had fraudulently induced the plaintiff to make the necessary payment to the second defendant upon the representation that the first defendant would immediately pay the plaintiff.

[34] Notwithstanding that Anne Kung (PW1) was, at the material time, the CEO (Chief Executive Officer) of the plaintiff – a public listed company on the KLSE (Kuala Lumpur Stock Exchange), as well as a qualified lawyer and accountant, she was nonetheless fraudulently induced by the third defendant (DW2) to make the necessary payment to the second defendant bearing in mind the status of the third defendant (DW2) as the common director of the first and second defendants. The powers of the third defendant (DW2) as the common director of both companies cannot be denied.

[35] In our judgment, it was wrong for the learned JC to dismiss the whole claim of the plaintiff when there was ample evidence adduced that blatantly pointed to the breach committed by the first and second defendants under the two contracts – the Earthfilling Agreement dated 15 October 1997 and the award letter dated 18 October 1997.

[36] The learned JC failed to give proper evidentiary value to the facts that the first defendant's refusal to pay and honour its obligations under the Earthfilling Agreement constituted a breach of the contract and compounded by the testimony of Sim Tsin Hock (also known as "Ah Hock") (DW1) that 30% of the work was completed as at 15 November 1997.

[37] Looking at the available evidence, we are constrained to hold that the learned JC should have allowed the plaintiff's claim against the first defendant. At the very least, there should be judgment against the second defendant and/or the third defendant for those 30% of the work done.

[38] It is also our judgment that the learned JC erred when he held that the plaintiff failed to prove the value of the work done. This was certainly against the evidence of Sim Tsin Hock (also known as "Ah Hock") (DW1) who testified that the second defendant had completed 30% of the said work (see p. 131 of the appeal record at vol. 1/part "A" & "B" at para. 15).

[39] There was no dispute that the Earthfilling Agreement is a legal, binding and enforceable contract. Yet, surprisingly the plaintiff could not enforce the Earthfilling Agreement.

[40] It is apparent that there was a misdirection in law by the learned JC when His Lordship, even without the assistance of the oral agreement, failed to hold that the Earthfilling Agreement is a valid and binding contract between the plaintiff and the first defendant.

[41] We have seen and read the Earthfilling Agreement dated 15 October 1997 between the first defendant and the plaintiff and this can be seen at pp. 612 to 616 of the appeal record at vol. 11/part "C". The signatures of the parties can be seen at p. 616 of the same appeal record. It is a valid and binding contract. Pollock Principles of Contract (13th edn.) 1, defined contract as "a promise or set of promises which the law will enforce". It is also ideal to read the case of *Sierra Leone Telecommunications Co Ltd v. Barclays Bank plc* [1998] 2 All ER 821.

[42] A contract is said to be executory so long as anything remains to be done under it by any party, and executed when it has been wholly performed by all parties. The Earthfilling Agreement can be described as an executory contract.

The Third Question

[43] We now turn our attention to an important issue in this appeal. It concerned the refusal by the learned JC to allow admission of the oral agreement to contradict, vary, add or substract from the terms of the Earthfilling Agreement and the award letter.

[44] That oral agreement was reached between Anne Kung (PW1) and the third defendant (DW2) and it brought into sharp focus the "back to back" payment arrangement. Dato' Seri Visu Sinnadurai in his *"Law of Contract"*, 3rd edn, vol. 1, at p. 190 under sub-topic "extrinsic evidence" had this to say:

> 4.36 Statutory provisions: sections 91 and 92 of the Evidence Act 1950. The extent to which oral evidence may be admitted to modify a written contract is provided for in sections 91 and 92 of the Evidence Act 1950. The general rule, as found in section 91, is that:
>
> > where the terms of a contract ... have been reduced by consent of the parties to the form of a document ... no evidence shall be given in proof of the terms of the contract ...

> Section 92 excludes the admission of oral evidence for the purpose of contradicting, varying, adding to, or subtracting from the terms of a written agreement. Certain exceptions to this general rule are also provided for, for example, any fact may be proved which would invalidate a document such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration and mistake in law or fact: see proviso (a) to section 92.

[45] The learned author continued to say at p. 191, at para. 4.37 spilling over to p. 192 as follows:

> 4.37 Written agreements: application of sections 91 and 92 of the Evidence Act 1950. The Federal Court in the case of *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, FC considered the scope of section 92 of the Evidence Act in detail. In this case, though the parties had entered into a written agreement, the respondents attempted to introduce other terms which they alleged had not been incorporated into the written agreement. The trial judge had, relying on the decision in *Coalfields of Burma Ltd v HH Johnson* AIR 1925 Rang 128, a case in which there was no written contract, admitted the evidence of the respondent. The Federal Court pointed out that reliance by the trial judge on Coalfields' case was wrong as he had not distinguished the case on the ground that there was no written contract in that case whereas, in the instant case, there was a written agreement. The Federal Court further pointed out that:
>
> > Section 92 specifically excludes evidence to contradict, vary, add to or subtract from any of the terms of contract in writing, except in any of the situations spelled out in the provisos thereto.
>
> The court relied on the cases of *Foo Tock Lim v Piong Liew* [1963] MLJ 67 and *Siah v Tengku Nong* [1964] MLJ 43. The Federal Court also pointed out the danger of admitting oral evidence in cases where there is a written agreement:
>
> > ... it would be open to any party to a litigation concerning an agreement to say that the agreement which is the subject matter of the dispute, did not contain all the terms thereof and to seek to introduce such terms or even terms which might not even have been within the contemplation of the other party. No agreement would then be safe from being re-written by one party in a court of law.

The court then went on to consider whether the evidence purported to be adduced by the respondents could fall within the provisos to section 92. The court, after stating that:

> ... the provisos qualify but do not eliminate the main provisions of the section, so that unless the additional evidence sought to be adduced falls within the scope of any of the provisos, it should not be allowed to be introduced as it would be to contradict, vary, add to or subtract from the terms of the agreement,

held that the present evidence did not fall within any of the provisos.

[46] We gratefully adopt what Dato' Seri Visu Sinnadurai wrote in his popular book entitled "Law of Contract" and we venture to add the following salient points. Where the terms of the contract have been incorporated into an agreement, the general rule is that extrinsic evidence may not be given to contradict, vary, add to, or substract the said agreement. This general rule was expressed way back in *Davis v. Symonds* (1787) 1 Cox Eq Cas 402 at 404-405; and in *Williams v. Jones* (1826) 5 B & C 108.

[47] However, extrinsic evidence may be introduced to show to the world at large, so to speak, that the written agreement did not represent the whole bargain between the parties (*Stones v. Dowler* (1860) 29 LJ Ex 122, Ex Ch; *Reuss And Another v. Picksley And Another* (1866) LR 1 Exch 342, Ex Ch; *Stewart v. Eddowes And Another*, *Hudson And Others v. Stewart* (1874) LR 9 CP 311; *Moore v. Garwood* (1849) 4 Exch 681, Ex Ch; *Hutton v. Watling And Another* [1948] Ch 398, [1948] 1 All ER 803, CA; and *Gold v. Patman and Fotheringham, Ltd.* [1958] 2 All ER 497, [1958] 1 WLR 697, CA).

[48] In order to show whether there is a valid written agreement, parol evidence may be admissible in order to show that the written agreement is not a valid contract because there was never any agreement between the parties (*Scriven Brothers & Co v. Hindley & Co* [1913] 3 KB 564).

[49] Extrinsic evidence may also be admitted in the interpretation of a written agreement in the following situations:

(a) where there is an allegation that the signature is void under the *non est factum* rule (*Foster v. Mackinnon* (1869) LR 4 CP 704);

(b) where the written agreement is subject to a condition precedent (*John Pym v. Robert James Roy Campbell, James Thompson Mackenzie And Richard Pastor Pritchard* (1856) 6 EL & BL 370);

(c) where the written agreement is not intended to give rise to a contractual relationship (*Orion Insurance Co plc v. Sphere Drake Insurance plc* [1992] 1 Lloyd's Rep 239, CA);

(d) where the written agreement does not correspond with the prior oral agreement between the parties (*Joscelyne v. Nissen and another* [1970] 2 QB 86, [1970] 1 All ER 1213, CA);

(e) where the application is made in order to show that an apparently valid contract has been invalidated by duress (*Henry Williams And Others v. James Bayley* (1866) LR 1 HL 200), fraud (*Pickering And Others v. Dowson And Others* (1813) 4 Taunt 779; and *Dobell v. Stevens* (1825) 3 B&C 623), illegality (*Madell v. Thomas & Co.* [1891] 1 QB 230, CA), misrepresentation (*Curtis v. Chemical Cleaning and Dyeing Co.* [1951] 1 KB 805, [1951] 1 All ER 631, CA), mistake (*Clowes v. Higginson* (1813) 1 Ves & B 524), and frustration.

[50] These are general principles of law which should be used as guidelines. In the context of the present appeal, the learned JC failed to consider proviso (b) to s. 92 of the Evidence Act 1950 which states as follows:

> (b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;

[51] *Sarkar's Law of Evidence*, vol. 1, at p. 1246 carries the following write-ups germane to the occasion at hand:

> Law is well settled that when a document in writing does not contain the entire agreement but embodies only some of the conditions oral evidence to prove some other terms agreed upon and not inconsistent with the written instrument is clearly admissible.

[52] Continuing at the same page and spilling over to p. 1247, the learned author had this to say:

When there is a contemporaneous or prior separate oral agreement as to a matter on which a document is silent, proof of it may be given only when such agreement is not inconsistent with or does not contradict the terms of the document (*Lakshmiayya v. Murahari*, A 1930 M 547). The proviso requires that (i) the separate agreement should relate to any matter on which the document is silent and (ii) that it is not inconsistent with its terms.

[53] In our judgment, there is no inconsistency between the oral agreement alluded to by Anne Kung (PW1) with cl. 6 of the Earthfilling Agreement. That cl. 6 states as follows:

6.(a) The Employer shall pay to the Contractor the contract sum of RINGGIT MALAYSIA THREE MILLION AND FOUR HUNDRED THOUSAND ONLY (RM3,400,000).

(b) The said contract sum shall be paid progressively to the Contractor within Six (6) months from the date of this Agreement.

[54] Now, cl. 6(b) of the Earthfilling Agreement merely states that the said sum to be paid progressively within six months from the date of the said Earthfilling Agreement. But, it is silent as to "when and how" the first defendant ought to make its progressive payment to the plaintiff and this gap is filled in by the oral agreement.

[55] That being the case, the oral agreement alluded to by Anne Kung (PW1) falls squarely within the ambit of proviso (b) to s. 92 of the Evidence Act 1950. It does not add or contradict cl. 6(b) of the Earthfilling Agreement. On the contrary, the oral agreement complements the Earthfilling Agreement.

[56] The oral agreement merely intended to prove that it was orally agreed that there was a "back to back" payment arrangement between the parties.

[57] Here, evidence was adduced by the plaintiff that there exist an oral agreement between the plaintiff and the first defendant. Indeed there were three sets of contemporaneous documents to establish the truth of the existence of the oral agreement.

The First Set of Contemporaneous Documents

[58] The first set of contemporaneous documents were between the draft sub-contract agreement in exh. P4 as seen at pp. 510 to 519 of the appeal record at vol. 11/part "C" and the draft construction agreement in exh. P5 as seen at pp. 520 to 524 of the appeal record at vol. 11/part "C".

[59] Alvin Chong Chee Vun (PW4) testified that he was instructed by Sim Tsin Hock (also known as "Ah Hock") (DW1) to prepare exhs. P4 and P5 on or about 14 October 1997 and that after preparing the same, he faxed over exhs. P4 and P5 together to Anne Kung (PW1) on the same day at 4.37pm for her verification. Anne Kung (PW1) testified that she had spoken to Alvin Chong Chee Vun (PW4) over the telephone in regard to exhs. P4 and P5 and she confirmed to PW4 that the terms in exhs. P4 and P5 were correct as orally agreed between the plaintiff, the first and the second defendants.

[60] A strong probative value must be attached to this first set of contemporaneous documents. A perusal of exh. P4 would show that it was the intention of the plaintiff, as well as the first and second defendants to be bound by the "back to back" payment arrangement and that both the contracts between the plaintiff and the first defendant on the one hand and between the plaintiff and the second defendant on the other hand were meant to be co-existing.

[61] The intention of the parties can be gleaned from exh. P4 particularly cl. 1, cl. 3(b) and cl. 7(a). Clause 1 of exh. P4 reads as follows:

> The sub-contractor shall be deemed to have notice of all the provisions of the main contract together with the specifications which forms a part thereof.

[62] Clause 3(b) of exh. P4 is worded in this way:

> The contractor shall pay the subcontract sum to the sub-contractor in accordance with the terms of payment in the main contract.

[63] Clause 7(a) of exh. P4 reads as follows:

> The sub-contractor shall commence the main contract works within the time which the contractor is to commence the same under the main contract and shall proceed with the same with due expedition.

[64] Of course, exh. P4 was not executed and it was subsequently replaced by the award letter but its mere existence confirmed the truth about the existence of the oral agreement as contended by the plaintiff. In our judgment, the existence of exh. P4 fortified the plaintiff's version of the existence of the oral agreement.

[65] Sim Tsin Hock (also known as "Ah Hock") (DW1) merely denied the existence of the oral agreement but he did not venture to explain why exh. P4 was in existence and was prepared in such terms and manner.

[66] And looking at the proximity of time between the discussions held between the parties and the date when exh. P4 was prepared, we can safely conclude that exh. P4 was the outcome of some oral agreement that had been reached between the parties.

The Second Set of Contemporaneous Documents

[67] Now, the second set of contemporaneous documents would be the Earthfilling Agreement dated 15 October 1997 and the award letter dated 18 October 1997. These two documents were prepared and executed three days apart from one another. Looking at their proximity, one can safely conclude that it was the intention of the parties that the contract between them was meant to be a "back to back" arrangement. These two documents are co-dependent on one another and they relate to the same subject matter.

[68] Due to their contemporaneity, the allegations of the first and second defendants in their defence that the plaintiff has appointed the second defendant on its own accord cannot be said to be the truth.

The Third Set of Contemporaneous Documents

[69] The documents involved here were between the second defendant's first interim payment for RM900,000 dated 18 November 1997 as seen at p. 480 of the appeal record at vol. 11/part "C" and the plaintiff's first progress claim for RM1 million dated 20 November 1997 as seen at p. 481 of the same appeal record.

[70] In our judgment, these three sets of contemporaneous documents categorically support the plaintiff's version of an oral agreement in regard to the "back to back" arrangement between the plaintiff, the first and the second defendants.

The Fourth Question

[71] Patently the learned JC erred when he held that the plaintiff failed to plead the "full particulars" of the fraudulent misrepresentation as envisaged under O. 18 r. 12 of the Rules of the High Court 1980 ("RHC"). In reality, the plaintiff pleaded at para. 11 of the Amended Statement of Claim at p. 64 of the appeal record at vol. 1/part "A" and "B" as follows:

> Particulars of Falsity
>
> The defendant knew and intended that the first defendant would not make any immediate payment or any payment at all to the plaintiff as represented.

[72] Pleadings, as a general rule, should contain particulars to ensure that the parties are informed with reasonable particularity as to the matters which are alleged against them. The reason for this simple principle is this. That no party should be taken by surprise (*Lim Kee Tiak v. Lim Kee Tian* [1986] 1 LNS 15; and *Bangkok Bank Ltd v. Prosperity Shipping & Trading (Pte) Ltd & Ors* [1990] 1 MLJ xxix). Another reason would be the desire to limit and define the issues at the trial (*Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd* [1992] 2 CLJ 1185; [1992] 2 CLJ (Rep) 121) as well as to save time and expense (*Spedding v. Fitzpatrick* (1888) 38 Ch D 410). All these would surely put the parties in a better position to prepare for trial (*Thorp v. Holdsworth* (1876) 3 Ch D 637).

[73] According to O. 18 r. 12(1) of the RHC only the "necessary particulars" need be pleaded and not the "full particulars" as required by the learned JC. It is obvious that the learned JC erred in law on this point.

[74] According to the learned JC, there was no fraudulent misrepresentation on the part of the defendants and/or the third defendant against the plaintiff. But the evidence showed, at the expense of some repetition, that the third defendant was the common director and shareholder of both the first and the second

defendants. To compound the matter further, the third defendant was the major shareholder of both the first and the second defendants. It is not surprising that the third defendant wielded power and exercised effective control over the operations of both the first and the second defendants. We agree with the contention of the plaintiff's counsel that the third defendant was used as a conduit by the first and the second defendants to cheat the plaintiff.

[75] The third defendant succeeded in using the first and the second defendants to defraud the plaintiff and in the process thereof the third defendant achieved unjust personal gains. It was through this fraudulent transaction that the third defendant gained the sum of RM700,000 from the plaintiff through the second defendant and yet the first defendant influenced by the third defendant deliberately refused to pay the plaintiff.

[76] The evidence showed that the third defendant was the person who requested payment from the plaintiff on behalf of the second defendant and it was the third defendant who collected RM700,000 from the plaintiff on 27 November 1997. And according to Anne Kung (PW1), it was the third defendant who gave her false assurances that the first defendant would pay. The overbearing character and positions held by the third defendant must have been too much for Anne Kung (PW1) to bear.

[77] By virtue of the false representation by the third defendant, the plaintiff was defrauded. And Anne Kung (PW1) had to part with the sum of RM700,000 for the benefit of the third defendant.

The Fifth Question

[78] It is our judgment that the learned JC ought to allow the plaintiff's claim against the second defendant for pre-liquidated damages of RM50,000 because there was evidence that the second defendant abandoned the said work after receiving RM700,000 from the plaintiff.

[79] It is also our judgment that the plaintiff has not committed any repudiatory breach. There was no evidence to show that the plaintiff has instructed the second defendant to stop work. It is mischievous on the part of the second defendant to allege that the plaintiff intended to repudiate the contract when the plaintiff paid only RM700,000 and not RM900,000.

The Cross-appeal

[80] In the context of the cross-appeal by the first defendant, we have this to say. That the learned JC was correct in holding that the first defendant had failed to prove or show that the first defendant had suffered damages.

[81] At all material times, the first defendant was the "wrong doer" for refusing to pay the plaintiff the first progressive claim despite the evidence that showed that 30% of the said work has been completed by the second defendant and that the plaintiff has even paid the second defendant the sum of RM700,000 as partial payment.

[82] In our judgment, as the "wrong doer" and the party at fault, the first defendant cannot now ask for a second bite of the proverbial cherry by claiming for the pre-liquidated damages of RM50,000.

[83] In the context of the second ground, we hold that the learned JC was correct in dismissing the first defendant's application to amend its counterclaim at the eleventh hour. It is our judgment that the first defendant's application to amend its counterclaim was nothing more than mere afterthoughts lacking in *bona fide* and totally unsubstantiated.

Conclusion

[84] It must be borne in mind that the plaintiff is still legally entitled under the Earthfilling Agreement to be paid by the first defendant for work done as at 15 November 1997 for the sum of RM1 million. The failure on the part of the plaintiff to secure RM1 million has caused great injustice and hardship to the plaintiff bearing in mind that the plaintiff has paid a total sum of RM700,000 to the second defendant yet the plaintiff was unable to collect any payment from the first defendant. The learned JC failed to recognise that it was the first defendant who had breached the Earthfilling Agreement. It was a fundamental breach that went to the root of the contract (*Ban Hong Joo Mines Ltd v. Chen & Yap Ltd* [1968] 1 LNS 13; *Hong Fok Realty Pte Ltd v Bima Investment Pte Ltd and another appeal* [1993] 1 SLR 73, CA; *Letchumanan v. Eng Mee Yong & Ors* [1976] 1 LNS 59; *Tan Ah Theam & Ors v. Ong Han Meng* [2000] 4 CLJ 380; *Law Ngei Ung*

& Anor v. Tamansuri Sdn Bhd [1989] 2 CLJ 181; [1989] 2 CLJ (Rep) 44; *Tan Yang Long & Anor v Newacres Sdn Bhd* [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666; and *Moschi v. Lep Air Services Ltd and another* [1972] 2 All ER 393, HL).

The Plaintiff's Appeal

[85] For the reasons alluded to above, we unanimously allowed the plaintiff's appeal with costs of RM30,000. We accordingly set aside the decision of the High Court. The deposit to be refunded to the plaintiff. We made a further order that interest will be calculated at the rate of 8% per annum from the date of the writ to the date of full payment.

The First Defendant's Cross-appeal

[86] We unanimously dismissed the first defendant's cross-appeal with costs of RM10,000. We too affirmed the decision of the High Court. The deposit should go to the plaintiff as part of the costs.

[87] This judgment in draft has been shown to my brothers Azhar Hj Ma'ah, JCA and Clement Allan Skinner, JCA and they both expressed their concurrence with it.